

Commission on Health and Safety and Workers' Compensation

MINUTES OF MEETING

August 27, 2009

**Elihu M. Harris State Building
Oakland, California**

In Attendance

Chair Sean McNally

Commissioners Catherine Aguilar, Kristen Schwenkmeyer, Robert Steinberg, Darrel "Shorty" Thacker, and Angie Wei

Executive Officer Christine Baker

Call to Order

Sean McNally, 2009 CHSWC Chair, called the meeting to order at 10:00 a.m.

Minutes from the April 30, 2009 CHSWC Meeting

Chair McNally requested a vote on the Minutes of the April 30, 2009 meeting.

CHSWC Vote

Commissioner Thacker moved to approve the Minutes of the April 30, 2009 meeting, and Commissioner Aguilar seconded. The motion passed unanimously.

Briefing on Return-to-Work Study

Seth Seabury, RAND

Seth Seabury stated that his presentation is based on preliminary findings and that before going through RAND's quality assurance process and the information is therefore subject to change. He stated that his presentation is a status update of RAND's work and a description of the direction where the research leading.

Background

Mr. Seabury stated that workers' compensation in California is the subject of perennial controversy, and that there are ongoing problems in the system which are widely recognized including cost uncertainty for employers and poor outcomes for injured workers. Important efforts have been made to address these problems and improve the situation, leading to dramatic reforms in recent years, including massive changes to the permanent disability system. He stated that in spite of reforms, there is continued uncertainty, exemplified by some recent controversial court decisions. He also stated that there is ongoing disagreement on how to fix the system.

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Mr. Seabury stated that everyone generally agrees that benefits are improving return-to-work outcomes for injured and disabled workers. The benefits to workers are straight-forward: they experience fewer earnings losses, get back to work sooner and have better health outcomes. He stated that employers also benefit from lower workers' compensation costs and savings on rehiring or retraining costs. Therefore, both parties can benefit from return to work. Nevertheless, there can be significant obstacles to returning disabled workers back to work. The way the system is currently set up, challenges exist in identifying work limitations and reasonable accommodations and in overcoming conflicting agendas resulting from various legal processes that affect injured workers. All of these processes can create frictions and tensions in the employer-employee relationship and prove to be a barrier to return to work.

Mr. Seabury stated that improving return to work has become a priority after recent reforms. In 2004, the State overhauled the way permanent disabilities are treated in California, resulting in large cuts in permanent disability awards, but also numerous provisions to reduce waste and improve return to work. This situation has left several outstanding questions, such as has return to work improved and if return to work has improved, might improved return to work offset reduced income replacement from benefit cuts?

Mr. Seabury stated that the study evaluates return to work in California, specifically:

- What are the trends in post-injury employment in recent years?
- How have these trends been influenced by workers' compensation reforms?
- Have factors outside the workers' compensation system had an effect?
- What challenges remain to bring injured workers back to work, and how can we overcome them?

Permanent Disability Policy Context

Mr. Seabury stated that compensation of permanent disabilities has been at the center of debate for some time. CHSWC research has informed public policy on permanent disability since 1994, when it was made a priority. RAND has been involved in a number of studies over the years for CHSWC and has helped identify many problems, specifically: poor return-to work in California, compared to other injured employees in other states; high earnings losses; and questionable benefit adequacy. He stated that RAND also identified other issues, such as inconsistent evaluation of disability severity, including ratings, and other inefficiencies such as physician shopping.

Mr. Seabury stated that this past research has helped motivate sweeping changes in recent reforms, namely:

- Benefit increases in Assembly Bill (AB) 749.
- Permanent disability provisions in Senate Bill (SB) 899, including the two-tier permanent disability benefit ("Bump-up Bump-down") which gave employers additional incentives to make an offer of alternative work to disabled workers, the subsidy program to pay for workplace modifications by small businesses, the adoption of what was perceived as a

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more “objective” rating system in the American Medical Association (AMA) *Guides*, and adjusted ratings to reflect data on earnings losses.

Mr. Seabury stated that despite these changes, the system still generates controversy. For example, new disability ratings have been shown to be much lower on average. He stated that because permanent disability (PD) benefits are pegged directly to ratings, the drop in ratings has been associated with a significant drop in PD benefits. He also stated that there are many aspects of the system that employers have claimed are inefficient, such as: inconsistent deadlines (e.g., requirements to make an offer of return to work sometimes even when the relevant medical reports are not in); and overlap with anti-discrimination policies, most notably the California Fair Employment and Housing Act (FEHA). Interpretation of legislation is ongoing and raises several questions such as: how will ratings be determined in light of recent court decisions and what will be the impact on benefits and employer costs?

Recent Changes to Anti-discrimination Law Complicate Any Evaluation

Mr. Seabury stated that changes to the anti-discrimination law pertaining to disabled workers in California were discussed in previous return-to-work presentations. He stated that one has to be careful when reviewing trends in return to work to not solely look at changes in the workers’ compensation system. In particular, in 2002, California strengthened FEHA, and this has resulted in the increased likelihood of making a claim for failure to accommodate a disability. Together with changes in the vocational rehabilitation system, it has become much more likely that FEHA claims will be relevant in a work-related injury. Therefore, the overlap in the eligible population suggests FEHA could have a strong influence on return-to-work decisions for workplace injuries. Mr. Seabury stated that it is important to consider changes such as this while evaluating return-to-work trends, or any changes in return-to-work rates could be misinterpreted. For example, changes could be mistakenly attributed to changes in the workers’ compensation system, when they were due to other factors. As an aside, Mr. Seabury also stated that the increase in the overlap of the eligible population can raise various issues and complications for employers, as compliance with FEHA can be inconsistent with requirements of workers’ compensation, and one could be complying with one system while violating the other.

Data and Methods

Mr. Seabury stated that the current study builds on methods used in previous RAND studies for CHSWC. Administrative data on workers’ compensation recipients were used and linked to quarterly data on earnings from Unemployment Insurance (UI) records. Data were then compared to similar workers who were not injured in the same firm. Injured workers were matched to observably similar uninjured “control” workers based on pre-injury earnings at the same firm. Control workers are needed in order to examine the impact of a disabling injury on the likelihood that one is working after an injury. The true impact of disability is the difference between what you *do* earn after an injury and what you *would have* earned with no injury. He stated that since they cannot observe what one would have earned, these earnings have to be estimated. He stated that without using controls to estimate post-injury earnings, any post-injury absence from work will automatically be attributed to disability. However, any number of reasons might explain absences and reduced earnings, such as retirement, firing, or other

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voluntary leave from employment, so controls provide the most accurate estimate of the true effect of disability. Control workers are also subject to these absences, so their earnings provide an estimate of uninjured earnings that accounts for these absences. Mr. Seabury stated that without controls, the risk is to overestimate the disruption to employment due to an injury.

Estimating the Impact of a Disability

Mr. Seabury outlined how the controls are used to estimate earnings loss. He stated that the impact of a disability is estimated by comparing the observed earnings of disabled and control workers in a quarter during the post-injury period. The difference between the earnings of control workers and what was actually earned by the disabled worker is the “earnings loss.” Mr. Seabury then presented an example where a control worker makes \$6,000 in a quarter and an injured worker makes \$3,000, creating an “earnings loss” of \$3,000. He stated that they also refer to “relative earnings,” the ratio of injured to uninjured earnings. In the example, the injured worker makes 50% of what the controls make, so the relative earnings are 0.5.

Measuring Return to Work

Mr. Seabury stated that while the previous studies focused largely on earnings, this study’s primary focus is on return to work. He stated that the employment data they use report total earnings in a quarter, but the data do not indicate precisely when or how often someone works. He stated that workers are defined as working if they are observed having any earnings in a quarter, and they are compared with their control to come up with the “relative employment ratio.” The relative employment ratio is equal to the average likelihood that injured workers are employed in quarter divided by the likelihood their control workers are employed. The relative employment ratio is the primary measure of return to work used in this study. Mr. Seabury stated that they examine how this ratio differs over time and across different several characteristics (e.g. firm size, disability severity).

Data Used for This Analysis

Mr. Seabury stated that the data used for the presentation are based on claims from the Workers’ Compensation Insurance Rating Bureau (WCIRB), with injury dates of Q1 2000 – Q2 2006. The data were based on the First Report of Injury (FROI) for consistency across all injury dates. To avoid compromising the trends by workers with different weekly benefit levels, the sample is restricted to workers who are unaffected by changes to TTD weekly benefit – workers whose earnings are neither very low nor so high as to hit the minimum and maximum rules, i.e. the middle distribution of wages – are isolated. The data are linked to earnings data through Q2 2008. Data include information on type and nature of injury and medical and indemnity benefits from WCIRB. There are up to two years of post-injury earnings for the entire sample.

Findings

Mr. Seabury stated that the findings show workplace injuries clearly have an adverse impact on employment. He described a figure comparing employment of injured workers and their uninjured controls before and after injury. In the pre-injury period, employment rates for the

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injured and non-injured controls are very close. He stated that they only match data on the four quarters prior to the injury, so the fact that employment matches up very closely in earlier quarters (5 to 8 quarters before injury) demonstrates that they have very high-quality controls. In the post-injury period, there is a substantial drop in employment for injured workers – only half of them are working 4, 8, and 12 quarters after an injury. He also stated that there is a substantial drop in employment by the uninjured controls over this period (though less than the drop for injured workers). This demonstrates that if they were to attribute all of the employment loss of injured workers to only the disability, they would be overstating the effect. Mr. Seabury stated that four to five years after an injury, there is about a 20% difference in the likelihood that the injured workers are working, compared to the controls.

Mr. Seabury then stated that differences in return-to-work outcomes by injury severity were considered. In the past, they measured disability severity with the disability rating applied in the system. However, since the system of rating changed in 2005, there has not been a consistent measure over time. An alternate measure of disability severity is used which uses the ranking of medical costs within a quarter of injury. Injured workers with relatively low medical costs are said to have less severe disabilities compared to those with higher medical costs. Of the three categories injured workers fall into, those in the lowest-severity category have a much higher percentage of those working 18 months after an injury than the most severe category.

Mr. Seabury presented another chart describing “relative employment” or the likelihood that the injured worker is working relative to the controls. A ratio of 1 in the pre-injury period means that they have the same work rate (again demonstrating the quality of the controls). For the most severe category a year after the injury, a disabled worker is only half as likely as their uninjured controls to be back working. He stated that while there is some improvement over time, there is still a 35% drop in the likelihood that the injured worker would be working even five years after an injury. He stated it is noteworthy that while the severe disabilities signify a large drop in employment, there is still a 20% chance of not working four to five years after a disability even for workers with the lowest severity.

Mr. Seabury stated that in addition to looking at the chance of working at any employer, they looked at the chance of remaining with the at-injury employer. A disability is particularly disruptive to continued work at the at-injury employer. The most severely disabled are less than 40% as likely to be working at the at-injury employer several years later. He stated that even for the least severe disabilities, it is disruptive to employment at the at-injury employer.

Trends in Return to Work

Mr. Seabury stated that over this time period, there have been fairly clear trends. Because return to work is not static—that is, it changes over different periods post-injury—the relative employment of injured workers by quarter was reported one and two years after the injury. In 2000, relative employment for workers injured was about 65-67% one and two years after an injury. Return to work was declining steadily over the first few years of the sample; then it sharply reversed, and return to work started to improve and actually ended up higher by the end of the sample period. This represents a substantial improvement in return to work, specifically the likelihood of working at any employer. There is a similar pattern to the likelihood of return to

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the at-injury employer, with significant improvements over the latter part of the time period. He stated that they also looked at trends in return to work by injury severity. The same general trend holds for the moderate and slight disability categories, but that it is most pronounced for the most severe category, where the most significant gains in employment are observed.

Mr. Seabury stated that in trying to interpret the trends that led to the gains in return to work, they observe that the 2004 reforms, in which SB 899 tried to improve return to work, did not produce a discrete jump where the reforms reversed the trend. The trend started to reverse well before the period of 2004. They started seeing gains in 2002 and 2003, depending on the series used. They think that the reversal could be related to some other factors outside of the workers' compensation system, such as changes in FEHA. It could also be related to changes in the vocational rehabilitation system. More work needs to be done to determine the underlying causes of these trends. While the results do not lead them to say that the reforms have not had any effect, they are not operating in a vacuum and there was some upward pressure operating already.

Trends in Earnings Losses

Mr. Seabury stated that one of the reasons they are interested in return to work is that it can be a strong predictor of earnings. Getting people back to work, getting them back sooner, and keeping them at their at-injury employer are all important factors in reducing the economic consequences of disability to disabled, injured workers. He stated that they therefore also want to see the trends in earnings losses. He presented a charted and stated that there are again significant earnings losses experienced by disabled workers – almost a third of earnings are lost over the 4-5 year period after an injury. He clarified that they were using cumulative earnings as the measure, not earnings in a point of time. He stated the relative *cumulative* earnings trend two years after an injury, there is a similar pattern to the one return to work. There is a steady decline in relative cumulative earnings (the losses after a disability were going up), with a sharp reversal in that trend in 2003 and recovering the relative losses by the end of the data series. He stated that relative earnings are also broken down into disability severity categories, and again, a similar pattern is presented. The trend was most evident for the most severe disability category. He stated that this is not to say that disability does not have an impact on earnings, but that the impact is less than it was earlier in 2001 and 2002, likely due to the gains in return to work over this period.

Summary of Findings

To summarize, Mr. Seabury stated that disabling workplace injuries have a substantial adverse effect on earnings and employment. He stated that even less severe disabilities cause disruption in employment – whether through limitations to work or some other factor such as frictions or inefficiencies in the system which exacerbate the earnings losses. He stated that return-to-work has clearly improved in recent years. The most severely disabled appear to have seen the biggest improvement. Gains appear to have started prior to the 2004 reforms. He stated that they have seen that these trends have led to a decline in proportional earnings losses.

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Next Steps

Mr. Seabury stated that the next empirical steps are to examine the impact on income replacement. Both earnings losses and benefits have been falling, and RAND wants to quantify the net impact. Specifically, he stated that they will want to look at: what has been the trend in the replacement of lost income; how income replacement varies by disability severity; and how much changes in return to work have influenced the changes in income replacement. He stated that more generally, they want to develop and highlight the policy implications of the findings and to move to the more fundamental questions of figuring out what barriers remain to return to work and the causes of the poor return-to-work rates and how to overcome them.

Questions from Commissioners

Commissioner Wei stated that the reforms in 2004 made changes to the PD schedule on January 1, 2005, which took out a third of the claims from the PD system and then flattened out everyone else's ratings. She asked whether Mr. Seabury was controlling for pre- and post-schedule, because she stated that she would argue that injured workers are getting a lower rating, which means their income replacement is going to be lower. Mr. Seabury responded that the results of the presentation are not looking at income replacement, rather return-to-work rates and losses prior to any kind of compensation. He stated that they are specifically looking at any trends in the impact of disability before any application of benefits.

Commissioner Wei asked whether all of the data includes everyone with a PD rating. Mr. Seabury responded that the data are disability claims which have a rating, but the issue of the presentation is not the net impact on income replacement but the trends in return to work and how that affected the earnings losses from disability. He stated that to analyze the impact on replacement rates would require applying the actual benefit levels to look at the fraction of those losses that are identified in this presentation that were replaced by benefits. Commissioner Wei stated that the overlap between those two analyses is really important and that the PD-rated cases that are left in the system are going to be more those of severe injuries at a lower rating. She stated that there may be an interesting trend after 2006, of lower return to work rates because those are folks who may be more disabled but less rated. She stated that RAND may have eliminated out everyone who was able to get back to work faster who may not have had a rating – maybe a zero.

Mr. Seabury stated that the data are based on the date of injury, and it is true that they do not have the rating; it will be interesting going forward to see the impact on people with more recent data (data currently available are only through 2006). He stated that income replacement is absolutely important, and it is the next step in their analysis. Also, he stated that before they can estimate the impact on income replacement, they have to estimate what the actual losses are that are trying to be replaced.

Commissioner Steinberg asked about the number of years of data used and consistency. Mr. Seabury responded that when they pooled the data, there were two steps: pooled data for the overall impact over the years – some people with up to five years of data and some with less. Therefore, depending on the individual, they have different years of data. Mr. Seabury stated

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that when they modeled trends, they only used two years of data, because they have that for everybody. Mr. Seabury stated that they only had WCIRB data but are now in the process of collecting ratings data from the Disability Evaluation Unit (DEU) data and linking them to Employment Development Department (EDD) records, which go through 2007.

Public Comments and Questions

Steve Zeltzer, Chair of California Coalition for Workers Memorial Day, stated that one of the areas not covered is the effect of the medical review boards in becoming obstacles and gatekeepers for workers in not being able to return to work promptly, because they cannot get the proper medical treatment. He stated that seriously injured workers have to go through a number of obstacles before they can get approval for surgery. Any type of survey should require investigating those workers who apply for these medical review boards and how long it takes to get their injuries taken care of or to have surgery. He stated that as a result of the stalling by the medical review boards and company doctors, workers end up permanently disabled, not able to go back to work because they do not get the appropriate medical care promptly. Ms. Baker confirmed and clarified with Mr. Zeltzer that he was referring to qualified medical evaluator (QME) panels, not utilization review (UR). Ms. Baker stated that she agrees that there are delays, and Mr. Zeltzer stated that there is a serious issue about delays with QME panels.

Mark Gerlach, consultant to the California Applicants' Attorneys Association, stated that he did not understand the answer to Commissioner Wei and the presentation slide about outcomes of injury severity. He recapped Mr. Seabury's explanation that they did not use ratings because they vary between the new and old rating schedule. He stated that 49.7% of the "slight" severe disability cases have a permanent disability. Mr. Seabury responded that the slide demonstrates how the measure of medical costs is a predictor of disability. Mr. Gerlach then stated that Commissioner Wei's comment about the "zeroes" was therefore relevant.

Mr. Gerlach also asked whether there were data for other periods of time, since 2000-2006 is a period when economic conditions in California may have had a major impact on the findings, especially the meltdown of one entire industry, financial services, in 2000-2001, and the extreme growth in construction and other industries in the period 2003-2006. He asked if they have looked at other periods of time to compare the impact of economic conditions on return to work. Mr. Seabury responded that they had not done that for this study, but that RAND had studied the impact of local economic conditions in the past. He also stated that economic conditions certainly matter, and they certainly believe that there are other factors beyond the workers' compensation system that could be driving or influencing the trends, and economic conditions could be one of them. He stated that they want to consider economic conditions going forward. Ms. Baker stated that with the controls, you are comparing people in the same situation. Mr. Gerlach stated that while that was true to an extent, there are questions about the particular segment of workers used.

Dina Padilla, President of Voices of the California Chapter Advocacy Group for Injured Workers stated that she has been involved with workers' compensation since 1992, and there are still injured workers who are permanently disabled, and there is still cost shifting to Medicare and Social Security. She stated that one of the things that has come across is that injured workers are

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sent continually to QMEs, as Steve Zeltzer alluded to, and she stated that she has a lot of contention about the workers' compensation system.

Ms. Padilla stated that it occurs to her that the occupational injury first report comes from a person's regular doctor and that is not being "counted in." She stated that whether it's work related or a regular medical condition, or if she has a heart attack at work vs. a heart attack at home, the insurance codes are the same. She stated that if one sees a regular doctor, it should be "counted in." More often than not, the medical care that injured workers "sustain" is not getting paid. If you go back to at least 1992, you would see that a lot of the liens have not been paid; a lot of doctors even give up on the idea – these are just the regular doctors. She stated that for a person to see 17 QMEs and still have their case out there is, to her, outrageous. She stated that the costs that have not been covered should be factored in – a lot of it to the doctors that they have already seen.

Ms. Padilla stated that she is an injured worker and has had \$100,000 of medical care that was not paid; she does not know how that would factor in, though that is continuing and going on today. She stated that it is not being paid by the insurance carrier but by her husband's health plan. She stated that she cannot afford to get on Medicare and she cannot afford their monthly income/monthly charges, so she is forced to go on her husband's health plan. She stated that there is still an outstanding sum of at least \$1,000 that is just for one surgeon that was never paid.

Ms. Padilla stated that QMEs take the conservative route, regardless of what the injured worker needs. She stated that consequently, there are a lot of injured workers out of work that are on Medicare and Social Security that are not being counted. She stated that because someone does not have a job, they go on unemployment for six months; then after unemployment runs out, those people are not counted as unemployed. She stated that they only go by the unemployment figures. There are a lot of people out there permanently injured that are not being counted. She stated that the original doctors need to be included in the study to find out the real cost and the extent of disability and how long they have been out of work.

Mr. Seabury stated that he had a further reply to Mr. Gerlach. He stated that while the economic conditions are important, one argument against them being a primary driver of the trends is that the more severely disabled are being more affected than the less severely disabled. He stated that they usually think that the less severely disabled would be closer to the margins of employment, and they would expect them to be more sensitive to economic conditions.

Linda Atcherley, California Applicants' Attorneys Association, stated that she understood that the lowest wage earners and highest wage earners were removed from the sample. She stated that there are a lot of union members – police officers, fire fighters, construction laborers – that fall well in excess of that rate, and she asked whether perhaps the wage loss impact has been somewhat lost by throwing out a fairly significant population of wage earners. Mr. Seabury responded that he did not want to give the impression that they will not look at the people outside of the boundaries, but it is difficult to look at trends in earnings loss when you know that a major factor in injury duration and disability benefits is changing over the same period, so they wanted to weed out that variation as much as possible. He stated that that is why they focused on the middle of the distribution. Ms. Atcherley stated that she understood, but as of 4/19/04, there is

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two-year temporary disability (TD) cap, so any benefit that a high-wage earner would have gotten for having an injury after that date will be lost by the fact that once they hit two years, they would no longer be receiving TD compensation. She stated that this removes a huge population of wage earners that may not even be the highest, maybe only \$700 per week, which are mostly union workers, construction workers, grocery workers, police and firefighters, and clerical worker, and some of them would go over those earnings. She stated that in the system of disability there are artificial caps everywhere, an artificial cap on TD benefits and artificial cap on PD benefits, and she stated that when the most severely disabled people and the return-to-work rates are considered, you need to recapture some of those high-wage earners, particularly because of the TD cap. She stated that one is not receiving a benefit from a higher TD cap when you get zero.

Mr. Seabury stated that while they are excluding some people from the sample, they are also excluding their controls. He stated that they are still able to capture the trends in return-to-work rates and the trends in earnings losses. He stated that they will look at the trends in the impact on the overall population; it is just more difficult to interpret this when these other changes are going on.

Ms. Atcherley stated that RAND has return-to-work rates at least through 12/31/08 when there was still real vocational rehabilitation, with a \$16,000 cap. She stated that with injuries prior to 1/1/04, people could go through a viable vocational rehabilitation program; it was a much more supportive system with a maintenance allowance as well. She stated that when looking at return-to-work rates, particularly with the most disabled people, running it through 2008 may perhaps have missed the impact on the return-to-work rates when there is no vocational rehabilitation program unless you controlled – and perhaps RAND did - for participation in a vocational rehabilitation program.

Mr. Seabury stated that they can identify people in vocational rehabilitation in the data, and they did look at the trends, and he stated that the trends are the same whether or not people are in vocational rehabilitation. He stated that it is difficult to interpret whether one is in vocational rehabilitation or not because it is so strongly correlated with the severity of the disability. Ms. Atcherley stated that she thought it was interesting to compare what happens to the return-to-work rate when there is not any of that support, particularly for the most severely disabled. She stated if you take a construction laborer and retrain them in new field, e.g., computer repair, at least it is a different trade in which they have no training. She stated that going forward, they may want to look at a person with complete loss of vocational rehabilitation support and what happens to the return-to-work rate. She stated that when they get injured, the situation is that “you’re on your own, buddy. Go back to work.”

Tom Linder, former Vocational Rehab counselor, asked if TD and social security disability insurance are considered income in the study. Mr. Seabury responded that they were excluded; only earnings reported to EDD/unemployment were included.

Commissioner Wei asked whether different benefit levels of TD make a difference, that is, on throwing out the low-wage and high-wage earners. Mr. Seabury responded that past studies have shown that the level of TD benefits influences the length of time people remain out of work. He

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stated that he was trying to identify changes in the time people were out of work over time without having the influence of changes in TD benefits; that is why they are looking at people in the middle of the wage distribution. He stated that if the TD benefit changes, there might be a change in the average return-to-work rates which was driven in part by the change in TD benefits, and they are trying to look at the change in return-to-work rates independent of that. Commissioner Wei stated that she is not convinced that that is the approach that she would take; if it were for an income reason to exclude it, it would make more sense.

Michael Nolan of the California Workers' Compensation Institute stated that when they do medical studies, for instance in workers' compensation and the group health or Medicare system, they compare experiences of the injured people with similar injuries in occupational and non-occupational systems. He stated that he realizes that this is not part of the study, but if you want to compare the two systems in the future, it may be worth consideration.

Commissioner McNally stated that he agreed that that was an important aspect. He stated that he earlier commented that any policy considerations or recommendations that result from the study have to take into consideration the Fair Employment and Housing Act (FEHA) and the interactive process, as well as the way non-industrial injuries are handled in the workplace.

Steve Cattolica, representing the California Society of Industrial Medicine and Surgery and a number of other medical provider organizations statewide, stated that his comment is about the process used in the study and how the methodology is vetted before the research work is undertaken. He stated that it is important for the public to understand this; his comment is not to take RAND to task because he admires their work. He stated that if questions remain after the fact, whether it might be worthwhile to get those questions and methodology in place before the contract and the work are undertaken.

Mr. Seabury responded that the study methods have been vetted for many years and that they have been building on the same methods since 1998 when the first earnings loss study by the Commission was published. Everything at RAND is made publicly available, but nothing gets published before it is reviewed by experts in the field. Mr. Cattolica stated that he may be using the wrong terminology, but he referred to the comments and questions about how RAND went about this work – how big the bell curve was, what was included or excluded, whether the study took the economy into account, whether the study looked at the zeroes that were created with the new PD rating schedule and the use of the *AMA Guides* – all of those things have nothing to do with you have done since 1998, yet they are all relevant. He also stated that either RAND is going to go back and redo everything and take some of these comments into consideration, or they will be ignored. He stated that his point is “wouldn't it have been better to have gotten some of these comments first to augment the existing methodology, than to have to go back and do the work twice.”

Ms. Baker stated that the purpose of this briefing is to get those comments in public. The report is not done, as data from DEU are not yet available to bring into all of these issues. She stated that this is a critical opportunity to vet the report in a public forum. Commissioner McNally stated that this was not the first vetting; there was at least one prior vetting, after which Mr. Seabury was asked to change and add certain aspects.

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Commissioner Wei stated that this Commission and the staff work harder to make things available to the public and transparent than she would argue almost any other commission, board or agency in this or any other administration. She stated that this is now available for public comment, and the staff actively solicits written comment post fact and then does an analysis in response to it. The first slide on the RAND study states that it is preliminary and incomplete, subject to change, for that very purpose. She stated that the point is well taken, but for her, it reaffirms the fact that the staff and the commissioners work very hard to make sure that the public comment is taken and not just taken but acted upon. The Commission will continue to encourage public comment at these meetings as well as written comment post fact. Commissioner McNally stated that he agreed.

Draft Report on Self Insurance Groups
Lachlan Taylor, CHSWC Staff

Judge Taylor stated that Assembly Member Joe Coto, as chair of the Assembly Insurance Committee, requested the Commission's analysis of self insurance groups in California. A draft report was presented at the April 30, 2009 Commission meeting and put out for public comment after that. Supportive comments received indicated that there are ways to expand general recommendations. Critical comments were helpful. For example, it was noted that Assembly Member Coto requested analysis of the marketing and representations made by self insurance groups and that that analysis was missing from the draft report. There was also a request to develop the policy decision about public disclosure of decisions of self-insurance group. There is a need to develop more thoroughly the arguments on this issue

Commission staff recommends that the draft report be amended, adding comments on areas that public comment indicated were lacking and providing further development of other issues. The revised report would be ready for the next Commission meeting.

Commissioner Steinberg asked if the amendments have already been made to the report. Judge Taylor responded that there has not been time to incorporate the comments even though the comment period ended a short while ago. This current draft is the same as the Commissioners reviewed at the last Commission meeting. The next draft could be posted even before the next Commission meeting to ensure that there is enough time for public

Commissioner Aguilar agreed that that should be done. Commissioner Wei asked about whether Assembly Member Coto asked for discussion about marketing efforts by self insurance groups. Judge Taylor responded that it was included in the original request but not included in the report. Commissioner Wei asked if that would be included in the next draft of the report, and Judge Taylor responded that it would.

Commissioner Wei asked if Judge Taylor knew the status of pending legislation on this issue, and Judge Taylor stated that pending bills seem to have come to a standstill, and he was not aware of any motion going on at this time.

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CHSWC Vote

Commissioner Wei moved to direct staff to draft amendments to the Draft Report on Self Insurance Groups in light of comments received and post the amended draft for further comments, so that the Commission may consider adoption of the amended report at the next meeting, and Commissioner Aguilar seconded. The motion passed unanimously.

Return-to-Work/FEHA Handbook

Juliann Sum, University of California, Berkeley

Juliann Sum stated that the Return-to-Work/FEHA Handbook has been an exciting project involving interpreting law for the stakeholders of the workers' compensation system. The project came about because small employers were having difficulty understanding Fair Employment and Housing Act (FEHA) laws. There was an Advisory Group meeting in December 2008 with active participation. A first version of the handbook was sent out for review in July and was revised to create the current draft. Comments were submitted by the Department of Fair Employment and Housing, the small employer community, management consultants, disability rights and independent living community advocates, the claims industry, and attorneys from both worker and employer sides. Ms. Sum stated that the draft handbook is now ready for comments from the public. After the 30-day comment period, the draft will be revised and circulated for review by key persons in the different workers' compensation sectors to ensure accuracy. The goal will continue to be to strike a balance between being legally accurate and readable by the lay public.

CHSWC Vote

Commissioner Thacker moved to approve for circulation and comment the Return-to-Work/FEHA/ADA Handbook, and Commissioner Aguilar seconded. The motion passed unanimously.

Executive Officer Report

Christine Baker, CHSWC

Ms. Baker stated that staff has been actively working on a number projects. We have had to overcome some obstacles such as the California budget negotiations and contract freezes and potential operating cost reductions. Many of our contracts for studies were placed on hold for several months until the budget was resolved. These delays cause study delays and the results. All of the contractors have been patient and we appreciate that.

Staff is working on the Annual Report which is also experiencing some delay due to problems getting accurate data from the new information systems. We are working with the Division of Workers Compensation (DWC) and Cal/OSHA to obtain and verify the data. The Commission's insurance study is now under peer review and will be finalized for the October or December meeting, depending on the extent of corrections by peer review.

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SCHOOLS IIPP Project – School Action for Safety and Health (SASH)

Work on the illness prevention programs for schools is moving along well. Commissioner Aguilar has been very active on this project. The Advisory Group has had its second meeting and the Needs Assessment has been completed.

Per the mandate set forth in the Labor Code, CHSWC is to assist inner-city schools and any school or district in establishing effective occupational injury and illness prevention programs (IIPPs). The target audience for this project will focus on K-12 schools and school districts at high risk of occupational injury and illness. A training program and resources would be developed for schools or school districts with high incidence rates, and a pilot with schools from around the State.

An Advisory Group was formed and two meetings were held: June 27, 2008, and June 30, 2009. The second meeting provided feedback on the Needs Assessment. Labor and management have been involved.

The primary goals of the needs assessment were to define the target audience for the trainings and the types of materials. Findings of the needs assessment included:

- In 2007, the incidence rate of occupational injuries and illnesses for California school employees (6.9 cases per 100 full-time employees) was higher than that of all industries in California (4.7 cases).
- The target audience for IIPP trainings should include district-level human resources staff responsible for writing IIPPs, as well as district-level maintenance and operations staff responsible for inspecting and correcting hazards at school facilities.
- Currently, there are no IIPP trainings being offered to school employees in the State. In fact, there are some school districts that may not even be aware of the IIPP requirement. Among those districts that are working to comply with the IIPP requirement, many expressed interest in attending a free training and receiving technical assistance in developing and implementing their IIPPs.

A training outline for the one-day curriculum has been developed. Training topics will include:

- Why Injuries Occur – A look at the Underlying Causes of Injury
- School Hazard Assessment and Assessment Tools
- Hazard Correction and Control
- Cal/OSHA Requirements and Other Related School Requirements
- Making Your IIPP Program Successful
- Involving Employees – Developing a Communications Plan
- IIPP Final Action Planning

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Materials are being developed for a one-day training program and resource guide. Discussion and feedback from the Advisory Group emphasized that the training should be streamlined, due to restricted budgets. Tip Sheets will include materials for food service workers, maintenance workers, custodian grounds workers, teachers (with separate content for science teachers, art teachers, vocation/career technical teachers, and special education teacher), bus drivers, and administrative and clerical staff.

Trainings will be offered through June 2010, with between one and two trainings each month. This is a pilot program and feedback will be important. This is a great opportunity for prevention.

Injury Reporting Research Funded by the U.S. Department of Labor

The Commission has been asked to participate as an in-kind partner on a project with the Bureau of Labor Statistics (BLS) and Les Boden to look at under-reporting of injuries. This project is a continuation of work with Les Boden, and if he wins the grant, the Commission would be an in-kind partner. The Commission would facilitate Memoranda of Understanding, getting the data, and getting the project through the State of California. No funds would be required from the Commission, only in-kind support by Commission staff. This study would be critical to an overall look at OSHA reporting at a national and state level.

CHSWC Vote

Commissioner Steinberg moved to approve that the Commission collaborate with the Bureau of Labor Statistics on the Federal level through an in-kind partnership to improve data reporting, and Commissioner Schwenkmeyer seconded. The motion passed unanimously.

IFDM 2010

The Commission is working on the International Forum on Disability Management (IFDM) 2010: Collaborating for Success, which will be held September 20-22, 2010, at the Wilshire Grand Hotel in Los Angeles, California. It will be hosted by the Commission in partnership with the Department of Industrial Relations and in collaboration with the International Association of Industrial Accident Boards and Commissions (IAIABC), and will involve many other partners nationally and internationally. The mission is to advance the efficiency and effectiveness of workers' compensation systems as well as disability management throughout the world.

IFDM 2010 will bring together attendees from across the world. We expect a total audience of 500 to 700 attendees. The diverse audience will include government agencies, employers, employees, disability management practitioners, insurance companies, policymakers, and other service providers, including physicians, clinics, health and social services in prevention and rehabilitation, and will participate in presentations, discussions, and workshops. There will also be an international research group offering a session in conjunction with IFDM 2010.

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The distinguished Advisory Committee provides direction and feedback on monthly conference calls. The next call will be on September 3rd. The goal is to highlight how disability management benefits workers, businesses and society. Steps taken to-date include: establishing a conference website (www.ifdm2010.com); sending out an email announcement, a call for papers and press releases; inviting key note speakers; developing an agenda; and submitting a grant proposal to the National Institute for Occupational Safety and Health (NIOSH).

RAND Working Papers

RAND has developed a number of Working Papers, and the Commission has heard presentations on these Working Papers over the past six months to a year by Barbara Wynn, who will again provide a briefing at the next Commission meeting. The Working Papers have not been peer reviewed but they are out for public comment. The Working Paper "Hospital Emergency Department Services Furnished Under California's Workers' Compensation Program" examines hospital emergency room services received by injured workers covered by the California workers' compensation system to determine whether there is an access problem. The conclusion is that there is no access problem. Key findings include that there were no indications that the recent reforms may contribute to excessive use of emergency department services, and that the volume of encounters that were for other than initial treatment of injuries declined 27.2 percent.

CHSWC Vote

Commissioner Aguilar moved to approve for circulation and feedback the RAND Working Papers -- Regulatory Actions that Could Reduce Unnecessary Medical Expenses Under California's Workers' Compensation Program, Hospital Emergency Department Services Furnished Under California's Workers' Compensation Program, and Ambulatory Surgery Facility Services Provided to California's Injured Workers -- and Commissioner Thacker seconded. The motion passed unanimously.

Comments by Commissioners

Commissioner Wei asked Ms. Baker to comment on the effect that the three furlough days per month were having on Commission staff and the work products. Ms. Baker responded that the staff is dedicated to see products come out. There are times when staff works, on a voluntary basis, on furlough days. Staff salaries have been cut 15 percent, and this affects the private lives of the staff.

Commissioner Wei asked what portion of the Commission's budget comes under the General Fund, and Ms. Baker responded that no funds come under the General Fund. Commissioner Wei asked whether that meant that the Commission's furlough days do not lead to budget/taxpayer savings, and Ms. Baker responded that that was the case.

Commissioner Wei stated that she would like the Commissioners to discuss whether the Commissioners should take an action to ask that Commission staff be exempt from furlough days given the fact that there is no State budget savings. Commissioner Aguilar suggested that a letter

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be formulated that would be signed by all the Commissioners. Commissioner Wei suggested that there be a vote on this action. Commissioner Steinberg asked whether there were any funds that were not General Funding, and Ms. Baker responded that at one time the Commission did have funding from the General Funding, but that now the Commission is entirely user-funded; this occurred when the Division of Workers' Compensation went to user-funding.

CHSWC Vote

Commissioner Wei moved that the Commissioners draft and send a letter to the Governor requesting that Commission staff be exempt from the three monthly furlough days due to funding not being under the General Fund, and Commissioner Aguilar seconded. The motion passed unanimously.

Public Comment

Chair McNally stated that comments would have to be within a three-minute limit.

Steve Zeltzer, California Coalition for Workers Memorial Day, stated that the Coalition believes that the Commission should support Bill HR 635, which provides a national commission to do oversight of workers' compensation to find out what has been happening nationally. He also stated that it is astounding that the Commission has no comments, reports, or discussion regarding the actions against Cal/OSHA by the current administration. Forty-seven staff members, Industrial Hygienists, Cal/OSHA, have stated that Cal/OSHA has been virtually dismembered by the Governor and the state policies. Mr. Zeltzer then stated that Cal/OSHA has eliminated all the doctors in the agency and will not have medical representation for the agency.

Mr. Zeltzer then commented that there is a great deal of concern about toxic dump sites in California, especially in Downey, California, the subject of a recent Los Angeles Times article focusing on movie workers and Kaiser workers. Kaiser has built a medical facility on a toxic dump site since 1927, and workers at the facility have been getting ill. Mr. Zeltzer stated there are many toxic dump sites in California that have been privatized under the Brownfield Act. An investigation needs to be done about what is happening to workers and the public at Downey and Bellflower. The costs are being shifted to the public, to the federal government, and social security insurance (SSI).

Mr. Zeltzer also stated that the biotechnology and nanotechnology industry is unregulated and workers who have been injured are having great difficulty proving where they have been injured. The case of David Bell, to be presented by his mother, illustrates that there are serious systemic problems that the Commission should address in the interest of the working people of California and the public.

Michael Nolan, California Workers' Compensation Institute, suggested that the Commission reach out to other special-funded units who have been exempted from furlough days as they prepare a letter about Commission staff to see how the case was presented. He offered to assist the Commissioners in their effort.

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Dena J. Padilla, Voices, California Chapter, stated that toxic sites exist in California without regulation and oversight and accountability, and without charges of criminal, penal and insurance fraud. She stated that Kaiser is self-insured. Everyone who walks into the facility in Downey is exposed to over 250 contaminants, including radiation and chromium hexalate, which is banned. Ms. Padilla stated Stuart Lichter who developed the property claimed to clean the property up, but the contaminants exist. Workers at the site and at the Kaiser facility have not been given medical care for illnesses due to toxic. The workers' compensation system does not provide oversight and regulation. Furthermore, self-insurance should not exist. Kaiser does not take care of its workers; it takes care of its patients because it can charge. The State of California has been alerted to the situation in Downey. Matt Gonzalez in San Francisco has a list of the contaminants. Ms. Padilla stated that this is a dire situation which affects the public at large.

Sandy Trend, mother of David Bell, stated that California is not protecting employees' rights to work in safe and health environments and to know the hazards that they have been exposed to, and California employers who willfully violate state laws are not being held accountable. Their misdeeds of fraud, corruption and concealment are held within the workers' compensation system. Ms. Trend stated that her son David Bell worked in a lab for a biotechnology company that discovers, screens and experiments with known and unknown microorganisms. There can be as many as 23,000 microorganisms. Ms. Trend stated that her son became sick after five months and eight days of working in the lab. He went through many visits to medical providers to determine why he was ill and to get emergency medical care and to handle his illness. He has been through several surgeries. His immune system was completely compromised, and several vital organs were affected including respiratory, heart, lung, spleen and liver. Fungus and bacteria in his body were linked to the biotechnology company's products. Medical care has been over \$333,000, mostly paid by Medicare and not by the company's workers' compensation carrier. Ms. Trend stated that California has to stop protecting its businesses and start protecting its workers.

Other Business

None.

Adjournment

Commissioner McNally stated that the next CHSWC meeting is scheduled for October 22, 2009, in Oakland, at 10:00 a.m.

Approved:

Kristen Schwenkmeyer, Acting Chair

Date

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Respectfully submitted:

Christine Baker, Executive Officer

Date